revealed without violating the privilege. The document itself may be producible, but not the attorney's knowledge of that document acquired in the course of the attorney-client relationship. That has been the interpretation of the privilege uniformly followed by courts heretofore. See, e.g., *In re Scranton Corp.*, 37 F.R.D. 465 (M.D. Pa. 1965) (memorandum of attorneys based on information supplied by client's counsel held privileged); *Crawford* v. *McKissack*, 1 Port. 433 (Ala. 1834) (indorsement on the bond in action had been obliterated; plaintiff's attorney held not compellable to state its tenor); *Donald* v. *Mitchell*, 43 Ill. 40, 45 (1867) (whether a promissory note, when handed to the attorney for bringing suit, was indorsed, held privileged); *Anonymous*, 8 Mass. (7 Tyng) 370 (1811) (court refused to compel attorney to disclose a document handed to him by client for use in litigation); *Gray* v. *Fox*, 43 No. 570 (1869) (testimony of attorney as to condition of notes when placed in his hands for litigation held privileged); *Brown* v. *Payson*, 6 N.H. 443, 448 (1833) (the situation and contents of a paper, delivered to an attorney for inspection in the course of his employment as attorney, held privileged); *Matthews* v. *Hoagland*, 48 N.J. Eq. 455, 21 Atl. 1054 (Ch. 1891) (whether a certificate, obtained from the client, was indorsed when the attorney saw it, held privileged); *Bulstrod* v. *Letchmere*, 2 Freem. Ch. 5, 22 Eng. Rep. 1019 (1676) ("the defendant being a counsellor at law shall not be bound to answer concerning any writings which he hath seen nor, for anything which he knoweth in the cause as a counsellor"); *Wheatley* v. *Williams*, 1 Mees. & Wels. 533, 150 Eng. Rep. 546 (Ex. 1836) (attorney not allowed to testify whether a paper shown in consultation bore a stamp; "all that appears

on the face of such document is a part of the confidential communication").

The Second Circuit has indeed created an unfortunate precedent. That fact alone warrants consideration of the denial of certiorari. But such reconsideration becomes all the more imperative because of the failure to effectuate deletion of the most offensive part of its unprecedented ruling.

3. The Question as to Whether Petitioner Received a Fair Trial Justifies Both a Rehearing of the Denial and the Grant of Certiorari.

The fourth question raised in the petition for certiorari herein (Pet. 2) was whether the petitioner had received a fair trial by an impartial jury as guaranteed by the Fifth and Sixth Amendments. That question was not utilized in expressing the reasons why certiorari should be granted. But in accordance with Rule 58(2), that question is now advanced in support of rehearing as being among "other substantial grounds available to petitioner although not previously presented." The component parts of the fair trial question may be stated as follows:

A.

Petitioner was tried on an 18-count indictment and convicted by the jury on 16 of those counts. The Court of Appeals reversed convictions on 8 of those counts. In a petition for rehearing before that court, petitioner contended that the jury had been prejudiced in its consideration of this case by hearing and considering the voluminous evidence on the 8 counts which were reversed—evidence that was legally insufficient and could not be deemed proof beyond a reasonable doubt by reasonable men. By returning guilty verdicts on these

counts, this particular jury indicated its tendency to overreact to otherwise insignificant prejudicial statements.

The trial record abounds with prosecutorial efforts to establish the defendant's domination and control of the activities of the two union locals in question. As all three members of the Court of Appeals panel recognized, "The danger in admitting evidence of this sort is that the jury may infer that the possession of such power is evidence of bad character." (Pet. 30a). The Court of Appeals has nevertheless indirectly acknowledged the validity of the defendant's contention—that the Government tried and won this case on the theory that the defendant was a "bad man."

A candid sensitivity to the "prosecutorial over-kill" reflected in the prosecutor's persistent recourse to prejudicial evidence compels, we submit, not a restrained expression of displeasure with the conduct of Government counsel, but reversal of the conviction on all counts.

B.

Throughout the trial the prosecutor engaged in a systematic course of character assassination directed at the petitioner. For example, he tried to portray petitioner as a cigar-smoking labor dictator reminiscent of Adolph Hitler (Tr. 285, 332-35, 1095). This allegation was cavalierly dismissed by the trial court as a mere "flight of eloquence". (Pet. 32a).

C.

Repeatedly the prosecutor asked his witness whether they would have testified without having been given immunity from prosecution. (Tr. 979, 1079, 1094A, 1100,

1102-1104). Through these questions the prosecutor effectively insinuated that the petitioner was part of a large group of "union criminals" who would only come forth to testify after being promised immunity.

D.

Finally, the prosecutor misled the jury into believing that petitioner was guilty of other crimes. Thus he cross-examined the character witnesses about defendant's prior arrests—arrests completely unrelated to this trial. The trial judge made no inquiry into the facts surrounding these alleged arrests and did not give the jury cautionary instructions at the times those questions were asked. Moreover, the trial judge refused to allow petitioner to bring out the circumstances of an alleged arrest for assault which had in fact resulted from an attack upon the petitioner by a gangster who charged petitioner with having assaulted him in response to petitioner's complaint. Although that charge had been summarily dismissed, as had the other charge which the prosecutor brought out, petitioner was precluded from explaining these circumstances to the jury. The combination of the prosecutor's insinuations and the trial judge's restrictions on presentation of the full explanation effectively created an erroneous and highly prejudicial picture of petitioner's character.

It is difficult for an appellate court to fully perceive the extent and cumulative impact of these events on the individual jurors. A barren and sterile written transcript can never effectively convey the emotional impact of a lawyer's trial tactics. Petitioner, however, observed these events first-hand; and petitioner suffered the consequences. Perhaps none of these errors taken individually is a sufficient reason for requiring a

new trial, but the cumulative effect of all these factors is more than sufficient to indicate that petitioner was not afforded a fair trial in a calm, unemotional and reflective atmosphere. Our courts have been accurately described as "palladiums of liberty," *Illinois* v. *Allen,* 397 U.S. 337, 346 (1970), and therefore defendants are required to behave with dignity and restraint. *Id.* Necessarily there is a greater burden on the government to try its cases without exaggerated appeals to human emotions and prejudices. In this case the prosecutor violated that basic standard and thereby deprived petitioner of a fair trial. In such circumstances the petition for a writ of certiorari should be granted.

CONCLUSION

The order denying the writ of certiorari should be vacated and the writ should be granted.

Respectfully submitted,

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CERTIFICATE

Counsel hereby certifies that this petition for rehearing of the order denying certiorari is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

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